89-1751

No. _____

FILED
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JOSEPH F. SPANIOL, JR.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

EASTERN PUBLISHING AND ADVERTISING, INC.,
(A Close Corporation) T/A "ARMED FORCES NEWS",

Petitioner,

V.

CHESAPEAKE PUBLISHING AND ADVERTISING, INC.,
(A Close Corporation) T/A "THE MILITARY NEWS";
KAREN A. HORN; KIMBERLY J. HORN;
CAROL WHITNEY ANSELL; DELLA LEMMINGS;
ALFRED E. CLASING, III;
RAYMOND J. CANNOLES; AND LOUISE MARTINS,

Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals For
The Fourth Circuit

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QUESTIONS PRESENTED

1. Did the Court of Appeals misapprehend this Court's decision in H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. ___, 109 S.Ct. 2893 as to the "pattern" requirement of RICO in that the Court determined the scheme alleged "must demonstrate" the requisite continuity or "threat of continuity" either by its intrinsic nature or sheer duration" where the Complaint and Affidavit filed alleged such threatened continuity?

2. Upon discovery by Petitioner, that two issues of its military and veterans newspaper had been wrongfully photocopied and assembled by Respondents into an infringing paper under Respondents name, and that statutory notice was required by omitted from them, may the Court of Appeals, sua sponte require Petitioner to maintain

continuous cloned production of those papers in order to bring and maintain those federal copyright infringement claims although Petitioner has otherwise complied with all statutory copyright registration and legislative requirements excusing such innocent omission?

3. May a federal court impose its own additional judicial non-statutory element upon the copyright infringement claims of Petitioner contrary to expressed Congressional intent as is specifically stated in conjunction with the 1976 enactment of the present federal copyright statute without violating the separation of powers doctrine?

4. Did the Complaint and support documents state a cause of action in each count sufficient to withstand a Rule 12(b)(6) Motion to Dismiss?

5. Were the District Court and the Court of Appeals required to deem

the factual allegations of Petitioner's complaint to be true for purposes of Respondents' F.R.C.P. 12(b)(6) motion to dismiss prior to any answering pleading being filed?

6. Is the proper scope of review of Petitioner's complaint upon Defendant's motion to dismiss under F.R.C.P. (12(b)(6), such that it must be determined by the Court that no relief could be granted under any set of facts that could be proven consistent with the allegations?

RULE 21.8 LIST AND

PARTIES TO THE PROCEEDINGS

Petitioner, EASTERN PUBLISHING AND ADVERTISING, INC.,[1] (Eastern) is incorporated and exists under the laws of Maryland. Eastern, for a number of years, has been engaged in the creation, printing and public distribution of several newspapers, one of which is an advertising supported military and veterans newspaper titled "ARMED FORCES NEWS."

Respondent, CHESAPEAKE PUBLISHING AND ADVERTISING, INC.,[2] (Chesapeake) is newly incorporated and exists under the

---

[1] Eastern Publishing and Advertising, Inc. is chartered in Maryland (as a Close Corporation) and has no publicly traded stocks nor parent, subsidiary or affiliate corporations to list pursuant to Rule 28.1.

[2] Chesapeake Publishing and Advertising, Inc., is chartered in Maryland (as a Close Corporation) and also has no publicly traded stock or a parent, subsidiary or affiliates to list pursuant to that Rule.

laws of Maryland. Eastern was created by Petitioner's departing employees shortly before suit was filed below. Using Petitioner's customer records, materials and other items, they took upon leaving Petitioner, they commenced to print and distribute several publications photocopied from Petitioner's newspaper. One of them is titled "THE MILITARY NEWS."

Respondents Karen Horn, Kimberly Horn (her sister) Carol Ansell and Della Lemmings were engaged in rendering services to Eastern until they terminated that relationship to openly use Petitioner's property and to render those services to Chesapeake which was created by them.

Respondents Alfred Clasing, Raymond Cannoles, and Louise Martins operate and conduct a law office in which some of the other Respondents engaged their

services and at which the Respondent Chesapeake was legally formed, filed and started its publishing business.

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Respondents.

_____

Petitioner, Eastern Publishing and Advertising, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit rendered in these proceedings on February 9, 1990.

DECISIONS BELOW

The opinion of the District Court of Maryland entered on December 15, 1986 was not published but is set out in the Appendix. (App. pp. A-32)

The opinion of the United States Court of Appeals for the Fourth Circuit entered on February 9, 1990 is not as yet published and is set out in the Appendix. (App. pp. A-1)

The prior opinion of the Fourth Circuit entered on October 16, 1987 is published at 831 F.2d 488 and is set out in the appendix (App. pp. A-1)

JURISDICTION

1. The opinion on remand of the Court of Appeals was filed on February 9, 1990. This Court issued its Writ of Certiorari on July 3, 1989 vacating the prior judgment of the Court of Appeals. The prior opinion of the Court of Appeals was filed October 16, 1987. The Order denying the Petition for Rehearing In Banc was filed on November

19, 1987. That Court's Mandate issued thereafter on November 27, 1987.

2. Jurisdiction is conferred upon this Court to review the decision of the Court of Appeals below by Writ of Cetiorari under 28 USC, ss 1254(1) timely proceeded upon under 28, USC, ss 2101(c).

STATUTES, RULES, AND PROVISIONS INVOLVED

The applicable provisions of Rule 12, F.R.C.P., as well as the federal Copyright Statute (17, USC, 101 et seq.) and Title 18, USC, are set forth in the Appendix hereto. (App. pp. A-66)

STATEMENT OF THE CASE

A. United States District Court, District of Maryland

This was a civil action filed in the District Court by Petitioner against

a newly formed competing newspaper and former employees for copyright infringement due to their direct unauthorized photocopying of at least two of Plaintiff's newspapers and assembling substantial photocopied parts of them into a single paper and by replacing Petitioner's name and using that infringing paper to commence to deceive plaintiff's own advertising customers and begin to fraudulently obtain plaintiff's advertising renewal contracts through display of the infringing newspaper to Petitioner's own customers in Maryland, Northern Virginia and Washington, D.C. This first complaint was dismissed on motion under F.R.C.P. 12(b)(6) with leave to amend.

Also filed were a separate Affidavit, Exhibits, and a Motion for Temporary Restraining Order detailing continuing multiple

fraudulent acts, infringements and taking and using of Petitioner's properties.

It was docketed as Civil No. JFM-86-1653 and styled Eastern Publishing and Advertising, Inc. v. Chesapeake Publishing and Advertising, Inc., et al.

On September 24, 1986 the plaintiff filed its five (5) count Amended Complaint.

Count one alleged Copyright Infringement upon those two (2) publications and set out their copyright registration numbers. Count two alleged statutory infringement damages. Count three alleged R.I.C.O. violation damages for mail fraud. Count four alleged R.I.C.O. violation damages for wire fraud. Count five is not at issue.

Both groups of defendants again filed Motions to Dismiss under Rule 12(b)(6) claiming that the amended

complaint counts also failed to state a claim upon which relief could be granted.

On December 15, 1986, without a hearing, Judge Motz issued his unpublished Memorandum Decision and Order Granting all defendants their Motions to Dismiss. Copy attached as appendix "D" herein. Dismissal of the infringement claims were erroneously based on no allegation of the publication of the infringed newspapers. The R.I.C.O. claims were dismissed for a lack of stating a pattern sufficient for racketeering activity.

A timely appeal was entered.

B. United States Court of Appeals, Fourth Circuit

On appeal it was docketed as No. 87-1520 styled Eastern Publishing and Advertising, Inc. v. Chesapeake Publishing and Advertising, Inc., et al.

The Court of Appeals affirmed the Rule 12(b)(6) dismissal of the Complaint by the District Court but based dismissal on a substantially different basis as to the copyright infringement claims.

The Court of Appeals, differing with the District Court, cited the complaint as having alleged facts showing the infringement, copying, and publishing by Defendants. But the court then determined, sua sponte, that, since the newspaper issues, infringed and lacking notice, were not being printed in continuous production at the time, then although statutorily permitted subsequent copyright registration was properly completed with intent of Petitioner to affix notice on all other copies that would be published in the future being stated, and being otherwise in compliance with 17 USC 405, those

acts of plaintiff still were not sufficient to permit the filing of an infringement suit. The Court of Appeals also affirmed the dismissal of the other claims on the same basis as given the District Court.

This Court granted Certiorari vacated and remanded for reconsideration in light of the decision of H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. ___, 109 S.Ct. 2893.

Upon remand the Court of Appeals did not remand to the trial Court but in a per curiam opinion again affirmed the dismissal.

C. District Court Jurisdiction

Jurisdiction of the District Court was invoked pursuant to Title 28, USC, Sections 1331; 1391(b) and (c); 1338(a) and (b); and Section 1337(a). Jurisdiction of that court was further authorized pursuant to Title 18, USC, Section 2 and 1964(a) and (c).

D. Relevant R.I.C.O. Determinations

Judge Motz erroneously determined that the R.I.C.O. counts were lacking in alleging a pattern of racketeering activity.

Judge Motz determined that the complaint, as written, stated only a "single alleged scheme." Citing, what he noted as a lack of guidance by the Fourth Circuit, he erroneously determined that a "pattern of racketeering activity" under 18, USC, Section 1961(5) and 1965 can only exist where two or more separate schemes are present. Judge Motz, in reviewing those many separate and continuous fraudulent transactions and taking of Petitioner's customers using several infringed publications and multiple separate but connected fraudulent acts determined them not to constitute a sufficient pattern of racketeering activity. (Appendix E, pp. A-39-41)

The Court of Appeals also affirmed the Rule 12(b)(6) dismissal of the racketeering counts and the Antitrust count upon the basis relied upon by Judge Motz. (Appendix B, pp. A-19-25)

This Court vacated and remanded for redetermination of the decision.

Upon remand the Court of Appeals simply affirmed by per curiam opinion.

REASONS FOR GRANTING THE WRIT

This Court specifically rejected the strict construction being applied to RICO Complaints as herein imposed erecting artificial barriers. In rejecting these restrictive interpretations this Court recognized RICO pattern requirements had "very relaxed limits" and that "Congress intended a flexible approach" 109 S.Ct. at 2900.

However the Court of Appeals restrictively and erroneously interpreted this Court's holding as to

the "pattern requirements" that the prior complaint filed in 1986 fatally failed to demonstrate "continuity or threat of continuity" either "by its intrinsic nature" or "sheer duration". The complaint and attachments in fact alleged many specific RICO acts and alleged they were continuing. Therefore this Court is urged to remove this new restrictive formulation of the pattern allegations.

The separate copyright issue herein is of paramount importance in the field of federal copyright law. This decision presents a judicially created essential element, or a judicially created impediment upon those statutory elements created by Congress in the grant of copyright infringement protection to those who now innocently omit statutory notice but who then comply with the statutes mandates prior to suit as are created by Congress permitting the filing of their infringement claims.

The literal application of this pre-suit mandatory element judicially imposed below, would result in requiring Petitioner to commence additional and continuous printing of the two copyright registered issues prior to filing of suit and maintain printing up to the ruling upon any Rule 12(b)(6) motion.

As far as Petitioner can determine and as noted by the Court of Appeals below, no other federal Court has been found to have imposed such a transparent requirement. Petitioner asserts that the decision by the Court of Appeals here is a judicial invasion of the legislative prerogative of Congress, and the Court, in its supervisory powers, is requested to reverse the decision of the Court of Appeals below.

ARGUMENT

I. Plaintiff's Allegations of R.I.C.O. Violations are Sufficient

A. Generally

In Sedima, S.P.R.I. v. Imrex Co., Inc. 473 U.S. 479 105 S.Ct. 3275 this Court specifically determined that the R.I.C.O. Act was to be "read broadly" and that neither a prior criminal conviction nor a "distinct racketeering injury" was necessary. It was determined that if a defendant engages in a "pattern of racketeering activity" as delineated and that racketeering activity harms plaintiff in his "business or property" the private claim arises.

This Court restated the term "racketeering activity" as being any act "chargeable" under certain generically described state laws, and any act "indictable" under state or federal provisions.

The Court approved the requirement that a pattern of racketeering activity be 2 or more acts of racketeering activity having the same or similar purposes, results, participants, victims or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated events, citing 18, USC, 3575(e).

Thereafter the Court determined that in order "to state a claim" the plaintiff must of course allege each of these [3] elements." The Court stated those elements to be (1) conduct (2) of an enterprise (3) through a pattern [that as defined by the Court above] (4) of racketeering activity. The Court then determined "But the statutes require no more than this." 473 U.S. 490, 105 S.Ct., 3286. The Court thereupon cited U.S. V. Turkette, 452 U.S. 576, 586-7, 101 S.Ct. 2524,

2530-1, as revealing its reach into legitimate enterprise.

This Court also has decided American National Bank etc v. Haroco, Inc., 473 U.S. 606 105 S.Ct. 3291 the same date (7/1/85). The lower Court had dismissed under F.R.C.P. 12(b)(6). It was held (per curiam) that injuries with or without damages is sufficient to state a claim.

That Court also found that this determination must be made by the Court upon applying "ordinary civil standards to pleadings."

This Court again set out to issue guidance to the lower courts and secure a uniformity of application of the pattern requirements of the statute when deciding H.J., Inc. v. Northwestern Bell Telephone Co., the foundation for remand in the instant case. This Court determined that what a Plaintiff must prove is continuity or its threat

"simplicitor" which in legal parlance means "simply", "without ceremony" or "in a summary manner".

This "simplicitor" tag was applied after this Court determined to "adopt a less inflexible approach" derived by using a common sense approach with the Congressional gloss 109 S.Ct. at 2901.

B. The Pattern Allegations Are Sufficient

The trial Court below and the Court of Appeals affirmed initially on the basis, that the Complaint alleged a single scheme of alleged racketeering activity with a single purpose and a single victim.

The statute, however, only requires, as here alleged, at least 2 separate acts of racketeering activity to constitute a pattern Sedima, S.P.R.L.. supra, 105 S.Ct. at 3285, n.14, not two separate racketeering

schemes.

The Court of Appeals, in its initial decision relied upon the Fourth Circuit decision of International Data Bank v. Zepkin, 812 F.2d 149 that, contrary to statute, a continuous fraudulent scheme of unlimited separate racketeering acts was not a sufficient pattern.

This Court rejected such an inflexible standard in Northwestern Bell and noted "often a RICO action will be brought before continuity can be established where the acts extended only over a few weeks or months and threatening to continue. Liability then will depend on whether the threat of continuity is demonstrated.

Here the complaint and exhibits clearly allege initial acts and others continuing and threatened. This is all that needs to be alleged to suffice.

Therefore the Court of Appeals erred in reaffirming its prior decision.

II. PETITIONER'S FACTUAL ALLEGATIONS MUST BE DEEMED TRUE FOR PURPOSES OF THIS MOTION TO DISMISS

Given Defendant's Rule 12 motion to dismiss prior to service of their answer, all of the factual allegations in plaintiff's Amended Complaint must be deemed true. See e.g. Hishon v. King & Spaulding, 467 U.S. 69, 104 S.Ct. 2229 (1984). That is, no relief could be granted under any set of facts that could be proven consistent with the allegations, Hishong, Supra. See Conley v. Gibson, 355 U.S. 41, 45-46, 78 American National Bank & Trust Co. v. Haroco, Inc., 473 U.S. 606, 105 S.Ct. 3291. This includes the exhibits annexed to the complaint, Goldman v. Belden, 754 F.2d 1059 (2d Cir. 1985), and papers and the affidavit.

Thus, the court may not weigh the evidence before it, but must deny the motion unless plaintiff cannot recover to a legal certainty. Ryder Energy Dis. Corp. v. Merrill Lynch Commod., Inc., 748 F.2d 774 (2d Cir. 1984). Accordingly, it is only the extraordinary case in which a dismissal is properly granted.
5 Wright & Miller, Federal Practice & Procedure, Section 1357.

See also Harper & Row Pub., Inc. v. Nation Enterprises, 471 US 539, 105 S.Ct. 2219, 2228-29 (1985). A certificate is prima facie evidence of the copyrights validity, Hasbro Bradley v. Sparkle Toys, 780 F.2d at 192.

At this posture it was fundamentally wrong for the trial Court and the Court of Appeals to summarily dismiss under Rule 12(b)(6) all of the claims presented herein.

III. PETITIONER'S COPYRIGHT INFRINGEMENT CLAIMS WERE VALIDLY PRESENTED AND THE JUDICIALLY IMPOSED CONTINUOUS CLONED PRODUCTION ELEMENT WAS NOT MANDATED BY CONGRESS

Judge Motz determined that the copyright claim was insufficient.

He noted the lack of the printed notice of copyright on the original published copies of Petitioner's newspaper and the Petitioner's stated intent of placing of such notice on all future published and distributed copies.

Judge Motz, however, erroneously determined that Defendants had created a new copyrightable newspaper when the defendants;

> ". . . cut out certain portions of Plaintiff's protected works, re-positioned certain portions thereof [and] pasted these portions together...
> . . . took the cut out por-

> tions of Plaintiff's newspapers containing copyright protection and reassembled, retouched . . . and removed certain identifying words from it. Thus, according to Eastern itself, defendants have recompiled the compilation."

He found, in dismissing this count, that this process of unauthorized copying and reproduction in copies cannot be said to constitute copyright infringement. Judge Motz apparently did not consider 17 USC, 106(1), (2), (3) and (5).

On this basis the District Court erroneously dismissed the complaint and all counts thereof.

Thus the appeal to the Court of Appeals presented the sole issue, as to whether or not the complaint presented an allegation or fact sufficient to show "that Defendants have copied ... a compilation."

The Court of Appeals supported its affirmance of the dismissal by sua

sponte determining that the ss 405 statutory savings clauses are not available to anyone unless there is maintained a continuous production of cloned items.

When the Circuit Court found that continuous subsequent production of the same item was a necessary statutory ingredient, it failed to cite any other decision finding such a requirement. Our research likewise finds no other such decision. The Court must have disregarded the fact that law publishers as well as Congress has stated Congress' intent to the contrary. See for example Hurwitz, "Omission of Copyright Notice Under Section 405(a): What kind of Oxymoron Moron Makes A Deliberate Error?", 60 N.Y.U.L.J. 956.

The Circuit Court did note that, contrary to the holding by the District Court, that the allegations of infringe-

ment by unauthorized photocopying and subsequent printing and publishing existed in the complaint. Thus the District Court had in fact erred when it erroneously dismissed on that ground.

In enactment of the new federal copyright statute Congress spelled out congressional intent on the provisions of ss 401-405 very specifically. Thus, in the report of the 94th Congress, the House Committee on the Judiciary submitted its detailed report to the House with its statutory revamping amendment virtually rewriting (save for the title and introduction) the former Senate Bill. With some unimportant minor changes, this revision was enacted. The Committee report, approved by trade groups, artists, writers, and even the Deputy Copyright Registrar, supported the following expressed intent reprinted at 5, U.S. Code Cong. and Adm.

News (House Report and Joint Cong. Reports) 5659 et seq. as follows:

> "SECTION 405. OMISSION OF COPYRIGHT NOTICE
>
> Effect of omission on copyright protection
>
> The provisions of section 405(a) make clear that the notice requirements of section 401, 402, and 403 are not absolute and that, unlike the law now in effect, the outright omission of a copyright notice does not automatically forfeit protection and throw the work into the public domain. This not only represents a major change in the theoretical framework of American copyright law, but it also seems certain to have immediate practical consequences in a great many individual cases. Under the proposed law, a work published without any copyright notice will still be subject to statutory protection for at least 5 years, whether the omission was partial or total, unintentional or deliberate.
>
> Under the general scheme of the bill, statutory copyright protection is secured automatically when a work is created, and is not lost when the work is published, even if the copyright notice is omitted entirely. Subsection (a) of

section 405 provides that omission of notice, whether intentional or unintentional, does not invalidate the copyright if either of two conditions is met:

> (1) if 'no more than a relatively small number' of copies of phonorecords have been publicly distributed without notice; or (2) if registration for the work has already been made, or is made within 5 years after the publication without notice, and a reasonable effort is made to add notice to copies or phonorecords publicly distributed in the United States after the omission is discovered.

Thus, if notice is omitted from more than a relatively small number of copies or phonorecords, copyright is not lost immediately, but the work will go into the public domain if no effort is made to correct the error or if the work is not registered within 5 years.

Section 405(a) takes a middle-ground approach in an effort to encourage use of a copyright notice without causing unfair and unjustifiable forfeitures on technical grounds. Clause (1) provides

that, as a relatively small number of copies or phonorecords, there is no effect upon the copyright owner's rights except in case of an innocent infringement covered by section 405(b); there is no need for registration or for efforts to correct the error if this clause is applicable. The phrase 'relatively small number' is intended to be less restrictive than the phrase 'a particular copy or copies' now in section 21 of the present law.

Under clause (2) of subsection (a), the first condition for curing an omission from a larger number of copies is that registration be made before the end of 5 years from the defective publication. This registration may have been made before the omission took place or before the work had been published in any form and, since the reasons for the omission have no bearing on the validity of copyright, there would be no need for the application to refer to them. Some time limit for registration is essential and the 5-year period is reasonable and consistent with the period provided in section 410(c).

The second condition established by clause (2) is that the copyright owners made a 'reasonable effort,' after

discovering the error, to add the notice to copies or phonorecords distributed thereafter.

...

"SECTION 408 COPYRIGHT REGISTRATION IN GENERAL

Permissive registration

Under the section 408(a), registration of a claim to copyright to any work, whether published or unpublished, can be made voluntarily by 'the owner of copyright or of any exclusive right in the work' at any time during the copyright term. The claim may be registered in the Copyright Office by depositing the copies, phonorecords, or other material specified by subsection (b) and (c) together with an application and fee. Except where, under section 405(a), registration is made to preserve a copyright that would otherwise be invalidated because of omission of the notice, registration is not a condition of copyright protection." Pages 5768-63, 68

What the Court of Appeals did not seem to understand, however, is that the new copyright act removed the old act forfeiture provision. Inserted in its

place is current Sections 401, 404 (Notice required) 405 (Effect of Omission). The effect of omission now is that the copyright protection will only be invalidated when certain other actions are not timely taken.

Lack of notice now is not simply excused under Section 405(a) but actually the copyright is itself now statutorily validated, and as such it is just as enforceable by Petitioner as with notice subject only to Petition, or as it did here, carrying out Section 405(b) provisions.

These copyrights here are statutorily enforceable. See Hasbro Bradley, Inc. v. Sparkle Toys, Inc., 780 F2d 89 (CA-2, 1985) rejecting and overruling Shapiro & Sons, Bedspread Corp. v. Royal Mills Assoc., 568 F.Supp. 972, and Beacon Looms Inc. v. S. Lichtenberg & Co., 557 F.Supp. 1305,

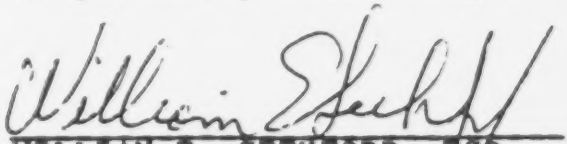
Oboler v. Goldin, 714 F2d 211, 212 (CA2-1983), Nimmer, 2 Nimmer on Copyright, Section 7.13(b)(3) at 7-96, N.43, and reprint of House Committee Report, 1976 U.S. Code Cong. & Adm. News, 5659, 5762, 5763, 94th Cong. 2nd Sess. H. Rep. No. 1476, pp. 147.

To use, as Defendants below did, as a single source, prior protected materials or compilations, to directly copy any portion and use that copied material is infringement. It is not how much or how little is plagiarized but whether any is plagiarized. See Detective Comics, Inc. v. Bruns Publications, 111 F.2d 432, 433 (CA2); Gleistein v. Donaldson Litho Co., 188 US 239, 23 S.Ct. 299; Alfred Bell & Co. v. Catolda Fine Arts, 191 F.2d 99, Ricker v. General Electric Co., 162 F.2d 141.

CONCLUSION

For the reasons advanced for the errors committed below it is respectfully requested that this Court grant certiorari and reverse the judgments below.

Respectfully submitted,



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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 87-1520

EASTERN PUBLISHING AND ADVERTISING INC., (A Close Corporation), t/a "Armed Forces News"

Plaintiff-Appellant

versus

CHESAPEAKE PUBLISHING AND ADVERTISING, INC., (A Close Corporation), t/a "The Military News"; KAREN A. HORN; KIMBERLY J. HORN; CAROL WHITNEY ANSELL; DELLA LEMMINGS; ALFRED E. CLASING, III; RAYMOND J. CANNOLES; LOUISE MARTINS

Defendants-Appellees

On Remand from the United States Supreme Court.
(C/A 86-1653-JFM)

Submitted: August 8, 1989
Decided: February 9, 1990

Before ERVIN, Chief Judge, and PHILLIPS and WILKINSON, Circuit Judges.

William Edward Seekford for Appellant. Henry R. Lord; John J. Kuchno, PIPER & MARBURY; Charles Martinez; ECCLESTON AND WOLF, for Appellees.

PER CURIAM:

This case is before us on remand from the Supreme Court, which vacated our earlier opinion, see 831 F.2d 488 (4th Cir. 1987), and remanded for reconsideration in light of H.J., Inc. v. Northwestern Bell Telephone Co., ___ U.S. ___, 109 S.Ct. 2893 (1989). See Eastern Publishing and Advertising, Inc., t/a "Armed Forces News" v. Chesapeake Publishing and Advertising, Inc., t/a "The Military News", et al., ___ U.S. ___, 57 U.S.L.W. 3858 (U./S. July 3, 1989).

The issue upon which the Supreme Court granted certiorari was whether, as we earlier held, the district court properly dismissed Eastern's civil RICO claim for failure of the complaint to allege a "pattern" of racketeering activity. Our reconsideration has therefore been limited to whether, in light of H.J., Inc., we erred in our holding on that issue.

Upon reconsideration, with the benefit of supplemental briefing by the parties, we have concluded that H.J., Inc. does not require any revision of our original opinion on that issue, and that it should therefore stand as the decision of this court.

Essentially, we conclude that our analysis of the insufficiency of the "pattern" allegations in our earlier opinion, see 831 F.2d at 491-93, remains sound and unaffected by the Supreme Court's opinion in H.J., Inc. Our earlier analysis rested on a perception that though the complaint alleged the requisite number of predicate acts of mail and wire fraud, and a sufficient relationship between them, it failed to allege sufficient continuity or threat of continuity to constitute the type "pattern" of activity contemplated by the

RICO statute. As we had in earlier decisions, we identified as a significant feature of the activities alleged that they amounted in the end to no more than "a single, non-recurring scheme to defraud a single entity by taking unfair competitive advantage in a quite narrow business context". Id. at 492.

The aspect of H.J., Inc. that touches most directly upon our analysis is the Court's emphasis that sufficient continuity or threat of continuity to satisfy that element of the pattern requirement may be found even in "closed-ended" single "schemes". In particular, the Court emphasized that the sheer duration of such a scheme, even though it had been brought to fruition and was "closed", might suffice the demonstrate a threat of recurrence, hence "continuity." See H.J., Inc., 109 S.Ct. at 2902 (closed-ended activity "over a substantial period of time").

We have carefully considered the implications of this emphasis in H.J., Inc. for our earlier analysis, and are satisfied that it does not require rejection of that analysis. Here, the activities upon which plaintiffs relied as establishing a "pattern" lasted and were brought to fruition with the accomplishment of their limited purpose over a period of only three months -- from March through April 1986. All the predicate acts of mail and wire fraud alleged occurred within that period, and the alleged end purpose of the activities was allegedly then accomplished.

We adhere to our earlier opinion that the "closed-ended" scheme to defraud here alleged did not demonstrate the requisite continuity or threat of continuity -- either by its intrinsic nature or sheer duration -- to constitute a "pattern" of "racketeering activity" within the meaning

of the civil RICO statute. Cf. Walk v. The Baltimore & Ohio RR, ___ F.2d ___, No. 87-3585 (4th Cir. Nov. 30, 1989) (finding sufficient continuity in ten years duration of closed-ended scheme, on remand from Supreme Court for reconsideration in light of H.J., Inc.).

And on that basis, we adhere to our affirmance of the district court judgment.

SO ORDERED.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 87-1520

Eastern Publishing and Advertising, Inc., (A Close Corporation), t/a "Armed Forces News",

Plaintiff-Appellant,

v.

Chesapeake Publishing and Advertising, Inc., (A Close Corporation), t/a "The Military News"; Karen A. Horn; Kimberly J. Horn; Carol Whiteney Ansell; Della Lemmings; Alfred E. Clasing, III; Raymond J. Cannoles; Louise Martins,

Defendant-Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, District Judge. (CA-86-1653-JFM)

Argued: June 29, 1987

Decided: October 16, 1987

Before PHILLIPS, ERVIN, and WILKINSON, Circuit Judges.

William Edward Seekford for Appellant; John Joseph Kuchno (Henry R. Lord; Piper & Marbury; Charles Martinez; Eccleston & Seidler on brief) for Appellees.

PHILLIPS, Circuit Judge:

Appellant Eastern Publishing and Advertising, Inc. (Eastern), appeals the Rule 12(b)(6) dismissal of its claims against a competing publisher, Chesapeake Publishing and Advertising, Inc. (Chesapeake), former Eastern employees, and former associates in the law firm that represents Eastern, alleging copyright infringement and R.I.C.O. and antitrust violations. We affirm the dismissal of the copyright claim because Eastern failed to attach the requisite notice to the advertisements and to the issues of its newspaper, "Armed Forces News," on which it claims copyrights. We also affirm dismissal of the civil R.I.C.O. and antitrust claims on the grounds relied upon by the district court.

I

Eastern publishes a quarterly newspaper, "Armed Froces News," which is

directed to military personnel and their dependents and which consists of original advertising and publicly available government press releases. Chesapeake publishes a competing newspaper, "The Military News." Claiming that its publication is entitled to copyright protection as a "compilation" under 17 U.S.C. ss 101,103, even though the government publications that make up the newspaper are not themselves copyrightable, 17 U.S.C. s 101, Eastern claimed that Chesapeake infringed its copyrights in two issues of the "Armed Forces News," Volume V, Number III and Volume VI, Number IV. Eastern also claimed that Chesapeake infringed valid copyrights in individual advertisements appearing in those same issues. Volume V, Number III first was published on March 22, 1986, and Volume VI, Number IV on March 27, 1986. Eastern registered

copyrights in these materials on May 9 and May 20, 1986, respectively. Copyright notices appeared on subsequent issues of the publication. No copyright notices appeared on the advertisements.

Appellees Karen Horn, Kimberly Horn, Carol Ansell, and Della Lemmings were employees of Eastern until April 1986. Appellees Alfred Clasing and Raymond Cannoles worked with the law firm retained by Eastern before formation of Chesapeake; appellee Louise Martins currently works with Clasing and Cannoles. Clasing, Cannoles, and Martin are Chesapeake directors, and Karen Horn is the company're resident agent. According to Eastern's complaint, the various named defendants were responsible for photocopying, cutting apart, and reassembling Volume V, Number III and Volume VI, Number IV of "Armed Forces News" to create and publish "The

Military News." Eastern further alleged that unidentified defendants represented to Eastern's advertising customers that Chesapeake was connected to Eastern and that the customers could renew their advertisements in Eastern's publication through Chesapeake. These customer contacts were alleged to have taken place through the mails and by interstate wire and telephone transmissions on various occasions during March, April, and May 1986.

In addition to claiming that publication of "The Military News" infringed Eastern's copyrights, Eastern charged that Chesapeake's exploitation of its customers led to a decline in the number of "Armed Forces News" customers, while the number of Chesapeake's customers increased to the point that Chesapeake now controls the relevant market. Thus, according to Eastern, Chesapeake's

activities have injured competition in violation of federal antitrust laws, 15 U.S.C. ss 1-15. Eastern did not allege before the district court that any other competitor beside itself had been injured, but on appeal Eastern submits that at least three other competitors exist and that at least one of these has been injured competitively. Finally, Eastern charged Chesapeake with civil R.I.C.O. violations for having committed multiple acts of mail and wire fraud in misleading Eastern's customers into publishing advertisements in "The Military News."

In ruling on appellees' 12(b)(6) motion, the district court found: (1) there was no copyright infringement because defendant's publication amounted to a recompilation of the copyrighted issues of "Armed Forces News"; (2) there was no "pattern" of racketeering

activity to support the R.I.C.O. claim; and (3) the facts alleged did not demonstrate the injury to competition required for an antitrust claim.

This appeal followed.

II

Eastern claims copyright in two separate sets of material: (1) advertisements published in "Armed Forces News"; and (2) particular issues of the newspaper, Volume V, Number III and Volume VI, Number IV. To succeed on a copyright claim, one asserting copyright protection must have registered the copyright, 17 U.S.C. s 411(A); Conan Properties, Inc. v. Mattel, Inc., 601 F. Supp. 1179, 1182 (S.D.N.Y. 1984). International Trade Management, Inc. v. United States, 553 F. Supp. 402 (Ct. Cl. 1982), and must also have attached notice of copyright on all publicly distributed copies of the protected item. 17 U.S.C. s 401(a); e.g., M.

Kramer Manufacturing Co. v. Andrews, 783 F2d 421, 443 (4th Cir. 1986).

No notice appeared on the individual advertisements. 17 U.S.C. s 404(a) permits a copyright notice on a compilation of work as a whole to cover individual parts of the whole, unless the individual part is an advertisement for the benefit of someone other than the holder of the copyright in the entire collective work. A newspaper claiming copyright ownership in an advertisement prepared for another must give specific and separate notice of its copyright in the advertisement. See Canfield v. Ponchotoula Times, 759 F2d 493 (5th Cir. 1985). Therefore, even if notice of copyright was affixed properly to the newspaper to cover the publication as a whole, that notice would not cover the individual advertisements, and there can be no copyright infringement as to them.

There also was no notice on the two issues of "Armed Forces News" for which copyrights were registered on May 9 and May 20, 1986. Assuming these issues were copyrightable as "compilations," which are selections or arrangements of even uncopyrightable material in an original way, see Southern Bell Telephone and Telegraph Co. v. Associated Telephone Director Publishers, 756 F2d 801, 809 (11th Cir. 1985), the registered copyrights lend no protection to Eastern unless the failure to place notice upon them is excused under 17 U.S.C. s 405(a). Section 405(a)(2) excuses omission of notice if

> registration for the work has been made before or is made within five years after the publication without notice, and a reasonable effort is made to add notice to all copies or phonorecords that are distributed to the public in the United States after the omission has been discovered.

Eastern, having registered copyrights in

the March 22 and March 27 issues on May 9 and May 20, and having placed general copyright notices on subsequent issues of the "Armed Forces News," claims that its copyright is preserved by the s 405(a)(2) excuse.

The District Court declined, in dictum, to excuse the failure to give notice under s 405(s)(2) because it believed this section of the Copyright Act "is most clearly applicable to products identical to one another which are in continuous production," citing Original Appalachian Artworks, Inc. v. Toy Loft, 684 F2d 821, 826-27 (11th Cir. 1982) (dolls); Shapiro & Son Bedspread Corp. v. Royal Mills Associates, 568 F. Supp. 972, 976-77 (S.D.N.Y. 1983) (bedspreads); Beacon Looms, Inc. v. S. Lichtenberg & Co., 552 F. Supp. 1305 (S.D.N.Y. 1982) (curtains); but cf. Canfield, 759 F2d 493 (considering the s

405(a)(2) exception in a case involving newspapers). Our research reveals only one case in which s 405(a)(2) has been invoked to preserve copyright protection for an article that is not in constant production, Werlin v. The Reader's Digest Association, 528 F. Supp. 451, 461 (S.D.N.Y. 1981), and we decline to follow its lead on the fact of this case. We therefore agree with the District Court that s 405(a)(2) does not apply unless there is continuous production of identical products, and for reasons that follow, we think that was not shown here.

Here, Eastern has claimed a copyright in two specific issues of its publication, each of which necessarily had not only a limited period of distribution but also a very limited lifespan in the hands of a consumer. Subsequent notice placed upon later,

different issues of "Armed Forces News" is ineffective to alert others that copyrights cover earlier issues. It is also impossible for Eastern to attach notice to the issues in question and thereby to comply literally with the second prong of s 405(a)(2).

Cases considering the related question whether one claiming protection under s 405(a)(2) must place notices of copyright on products already distributed to customers or only on products still in the hands of a retail seller support this conclusion. See e.g., M. Kramer, 783 F2d at 444; Donald Frederick Evans and Associates, Inc. v. Contiental Homes, 785 F2d 897, 911 n.22 (11th Cir. 1986). Whatever their particular conclusions, these causes, like those construing the "reasonable effort" required by s 405(a)(2), proceed on the premise that products protectible under

s 405(a)(2) must have continued distribution, at least from a retailer, as well as continued use in the hands of a consumer or retailer. That simply is not the case with respect to the discrete issues of newspapers for which protection is sought here. These products obviously do not have those essential aspects.

Because the savings provision of s 405(a)(2) does not apply here, Eastern's failure to give notice is not excused, and the two publications of "Armed Forces News" do not merit copyright protection.

III

We also agree with the District Court's dismissal of Eastern's civil R.I.C.O. claim. The essential elements of this type of R.I.C.O. claim are: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985). The racketeering activities upon which Eastern's claim is based are mail and wire fraud allegedly committed when appellees solicited appellant's advertising customers, misrepresentating that they were working on behalf of the "Armed Forces News." The district court found that these instances of mail and wire fraud did not establish the requisite "pattern" for a successful R.I.C.O. claim.

We think decision here is controlled by our intepretation and application of the "pattern" requirement in International Data Bank, Ltd. v. Zepkin, 812 F2d 149 (4th Cir. 1987). In that case, drawing on the Supreme Court's recognition in Sedima, 473 U.S. 479, that more careful adherence by the courts to this requirement might properly limit civil R.I.C.O. claims to

their proper scope, we concluded that "no mechanical test can determine the existence of a R.I.C.O. pattern," and that the question is necessarily a "matter of criminal dimension and degree" to be decided on a case-by-case basis. Zepkin, 812 F2d at 155. The touchstone for assessing this we thought was revealed by the legislative history's emphasis that what was targeted was "not sporadic activity" but continuity or the threat of continuity of racketeering activity. Id. at 154. On this basis, we concluded that as a general proposition "a single, limited fraudulent scheme," notwithstanding it might include the requisite minimal number of sufficiently related predicate acts would not constitute the "pattern" of racketeering activity contemplated by Congress. Id. Such a single, limited scheme we thought was not the kind of

"ongoing unlawful activities whose scope and persistence pose a special threat to social well-being." Id. While we recognized that a scheme properly considered to be a "single" one might by virtue of its very size and continuity meet the test, we thought the typical fraudulent schemes, limited in occurrence, in scope, and in purpose, that have been the traditional subjects of state tort law were not intended to be swept into R.I.C.O's reach by Congress. Id.

On this basis we concluded that a R.I.C.O. complaint by investors alleging as predicate acts two violations of the securities laws in connection with the sale of securities did not sufficiently allege a pattern of R.I.C.O. activity. We held that the conduct charged was instead merely that of a "single, limited scheme" to defraud. Though

it met the technical requirements of a sufficient number of predicate acts sufficiently related to each other, it failed to charge the kind and degree of continuous engagement in criminal conduct required to constitute a R.I.C.O. "pattern."

We think exactly the same analysis applies to the conduct charged here. The predicate mail and wire fraud acts charged are sufficient in number. They are sufficiently related in allegedly furthering Chesapeake's efforts to gain a competitive edge over Eastern. But in the end all that results is a single, non-recurring scheme to defraud a single entity by taking unfair competitive advantage in a quite narrow business context. There is no inference that the scheme embodies a threat of continued like activity in the future. Just as the scheme alleged in Zepkin was found

wanting in the required degree of continuity of conduct, so is that here. The complaint fails to allege a R.I.C.O. pattern of racketeering activity. See Medallion TV Enterprises v. SELECTV of California, Inc., 627 F. Supp. 1290, 1296-97 (C.D. Cal. 1986) (series of calls and letters over a two-month period constitutes a single criminal episode, not a "pattern of activity"); Phelps v. Wichita Eagle-Beacon, 632 F.Supp. 1164, 1171-72 (D. Kan. 1986) (several telephone conversations and mailings in furtherance of single ongoing scheme to harm plaintiff not a R.I.C.O. "pattern"); Grant v. Union Bank, 629 F. Supp. 570, 578 (D. Utah 1986) (multiple mail and wire conviction in furtherance of single fraudulent loan scheme not a R.I.C.O. pattern); cf. Temporaries, Inc. v. Maryland National Bank, 638 F. Supp. 118 (D. Md. 1986)

(recognizing that single open-ended scheme might be so extensive in potential scope as to constitute pattern); see also HMK Corp. v. Walsey, ___ F2d ___, No. 86-3582 (4th Cir. Sept. 17, 1987) (applying Zepkin to find no pattern in single scheme extending over long period and involving many predicate acts aimed at corrupting political processes to gain competitive advantage).

IV

Eastern's antitrust claim is based upon the defendants' acts of copyright infringement and appropriation of confidential business information. The district court held this not to be the type of conduct at which the antitrust laws are aimed, and we agree. See Bunker Ramo Corp. v. United Business Forms, Inc., 713 F2d 1271, 1283 (7th Cir. 1983). Moreover, the antitrust

laws are inapposite here because the only damage is to Eastern as a competitor; there is no alleged injury to competition in the relevant market. See id., at 1284-85; Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977). Eastern complains on appeal that in finding no injury to competition, the district court erroneously believes that there were no competitors in the market other than Eastern and Chesapeake. The court noted that before the creation of Chesapeake, there was only one market entity, Eastern, and that if events transpire as Eastern predicts, there will only be one market entity, Chesapeake. Therefore, there was no injury to competition. Eastern now avers for the first time that there are other competitors who are also harmed by Chesapeake's activities. We decline to take into account these other

alleged competitors because their existence and injury were not averred in the complaint nor in any way suggested to the district court.

AFFIRMED.

Appendix C

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 87-1520

Eastern Publishing and
Advertising, Inc., etc.,

Appellant,

versus

Chesapeake Publishing and
Advertising, Inc., etc., et al,

Appellees.

On Petition for Rehearing with Suggestion for Rehearing In Banc.

O R D E R

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that leave to file the petition for rehearing out of time is granted and the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Phillips, with the concurrence of Judge Ervin and Judge Wilkinson.

For the Court,

/s/ John M. Greacen

CLERK

Appendix D

NOTICE OF ISSUANCE OF MANDATE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

November 27, 1987

TO: U.S. District Court for the
District of Maryland at Baltimore

RE: 87-5120 Eastern Publishing v.
Chesapeake Publish
CA-86-1653-JFM

HEREWITH IS THE MANDATE OF THIS COURT IN THE ABOVE-ENTITLED APPEAL. The certified judgment and original record on appeal are returned ONLY to the district court/agency.

Enclosures:

__X__ Opinion and Certified copy of the judgment

__X__ Bill of costs form

__X__ Original record on appeal consisting of

__2__ Volumes of pleadings

__1__ Volumes of transcripts

____ Volumes of exhibits

____ Volumes other

__3__ TOTAL VOLUMES

____ The record will be returned at a later date.

____ The record was never transmitted by the D/Ct.

____ Other _____

Please acknowledge receipt of these documents on the enclosed copy of this notice.

JOHN M. GREACEN, Clerk

By:_____
E. Marshall Buckles
Deputy Clerk

Copies of this notice forwarded to:

William Edward Seekford, Esq.
Henry Robbins Lord, Esq.
John Joseph Kuchno, Esq.

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EASTERN PUBLISHING AND ADVERTISING, INC.	*	
V.	*	Civil No. JFM-86-1653
CHESAPEAKE PUBLISHING AND ADVERTISING, INC.	*	

****

MEMORANDUM

Eastern Publishing and Advertising, Inc. has brought this action against persons formerly associated with it and against a new company, Chesapeake Publishing and Advertising, Inc., which these persons formed. Eastern publishes "Armed Forces News," a quarterly newspaper consisting of original advertising and publicly available government press releases. Defendants now publish a competing newspaper called "The Military News."

Eastern's original complaint contains claims for copyright infringe-

ment, willful copyright infringement, RICO violations, anti-trust violations, fraud, and unfair competition. After a hearing, this Court granted motions to dismiss filed by defendants as to the original complaint and granted plaintiff leave of Court to file an amended complaint. An amended complaint has now been filed which, except for the deletion of the fraud claim, is substantially identical to the original complaint. Defendants have renewed their motions to dismiss.

There is no diversity of citizenship between the parties and the only asserted basis for the subject matter jurisdiction of this Court is its federal question jurisdiction over the copyright, RICO and anti-trust claims. Since the Court finds that plaintiff has not stated any claim for relief on these federal claims, it will decline to

exercise its pendent jurisdiction over whatever state law claims plaintiff may be asserting and will not reach the legal issues raised by those claims. Copyright infringement Claims.

Section 411(a) of Title 17 of the United States Code provides that "no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title." In the amended complaint plaintiff has identified only two issues of the Armed Forces News which have been properly registered. Accordingly, plaintiff's copyright claims are limited to those two issues. See, e.g., Conan Properties, Inc. v. Mattel, Inc., 601 F.Supp. 1179, 1182 (S.D.N.Y. 1984); International Trade Management, Inc. v. United States, 553 F.Supp. 402 (Ct. Cl. 1982).

Eastern alleges that the two issues in question contain two types of copyrighted material: original advertising and a compilation of government publications (which are not themselves copyrightable). Eastern has never - either at the time of the original publication or since - placed notices of copyright upon the individual advertisements. Its failure to do so bars it from asserting that its copyrights for those advertisements have been infringed. See Canfield v. Ponchatoula Times, 759 F2d 593 (5th Cir. 1985).

The two issues in question likewise did not include notices of copyright. Eastern has placed copyright notices on subsequent issues and argues that the lack of notice on the prior ones is therefore excused under 17 U.S.C. section 405(a)(2). Section 405(a)(2)

provides that omission of the copyright notice does not invalidate the copyright if "registration for the work has been made before or is made within five years after the publication without notice, and a reasonable effort is made to add notice to all copies or phonograph records that are distributed to the public in the United States after the omission has been discovered." This section is most clearly applicable to products identical to one another which are in continuous production. See e.g., Original Appalachian Art Works, Inc. v. Toy Loft, 684 F2d 821, 826-27 (11th Cir. 1982) (dolls); Shapiro & Son Bedspread Corp. v. Royal Mills, 568 F.Supp. 972, 976-77 (S.D.N.Y. 1983) (bedspreads); Beacon Looms, Inc. v. S. Lichtenberg &

Eastern also argues in its memorandum opposing defendants' motions to dismiss that section 405(a)(1) applies. However, the amended complaint alleges no facts to support that conclusion.

Co., 552 F.Supp. 1305 (curtains). It is difficult to understand conceptually the application of the provision in the context of a single publication, and this Court questions whether it does apply in such a context. But see Canfield v. Ponchatoula Times, supra. However, this issue need not be addressed here, for Easten has failed to allege facts sufficient to show that defendants have infringed any copyrighted compilation.**

17 U.S.C. section 101 defines a compilation as "a work formed by the collection and asembling of the existing materials or of data that are selected, coordinated, or arranged in such a way

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By the same token the Court need not reach the question of whether a deliberate omission of the notice of copyright invalidates the copyright. Compare Hasbro Bradley, Inc. v. Sparkle Toys, Inc., 780 F2d 189, 194-96 (2d Cir. 1985) with Beacon Looms, Inc. v. S. Lichtenberg & Co., supra.

that the resulting work as a whole constitutes an original work of authorship ..." The fact that the materials compiled in the "Armed Forces News" are government publications, which are not copyrightable, 17 U.S.C. section 105, is not dispositive. "A compilation is capable of being copyrighted even where it merely consists of a selection or arrangement of facts which individually would not be copyrightable but the originality involved in the selection and/or arrangement of such facts is sufficient to constitute the resulting compilation of a protectable literary work ..." Southern Bell Tel. & Tel. v. Assoc. Telephone Dir., 756 F2d 801, 809 (11th Cir. 1985). Here, however, Eastern has failed to allege facts sufficient to show that defendants have copied an original work or a compilation. To the contrary, Eastern

claims that "certain Defendants ... cut out certain portions of Plaintiff's protected works, re-positioned certain portions thereof [and] pasted these portions together." Similarly, Eastern alleges that defendants "took the cutout portions of Plaintiff's newspapers containing copyright protection and reassembled, retouched ... and removed certain identifying wording from it." Thus, according to Eastern itself, defendants have recompiled the compilation. Absent more specific averments (which Eastern has failed to make despite having been given the opportunity to do so), this process of recompilation cannot be said to constitute copyright infringement.

RICO Claim

The predicate acts upon which Eastern relies as a basis for its RICO claim all relate to a single alleged

scheme. Defendants are alleged to have breached duties which they owed to Eastern by establishing "The Military News" while still working for Eastern and to have wrongfully appropriated materials from the "Armed Forces News." What constitues a "pattern of racketeering activity" under RICO is, of course, subject to continuing disagreement, and the Fourth Circuit has not yet provided definitive guidance on the point. Whether such a pattern can exist only where there are more than two alleged schemes or episodes, see Frankart Distributors, Inc. v. RMR Advertising, 632 F.Supp. 1198, 1200 (S.D.N.Y. 1986); Northern Trust Bank/ O'Hare, & A v. Inryco Co., 615 F.Supp. 828, 831 (N.D. 111. 1985), or whether it may inhere in a single open-ended scheme, see, e.g., Temporaries, Inc. v. Maryland National Bank, Civil No. Y-84-4519 (D. Md. June

6, 1986), has not been settled. However, while there may be some authority to the contrary, see, e.g., R.A.G.S. Couture, Inc. v. Hyatt, 774 F2d 1350 (5th Cir. 1985); Conan Properties, Inc. v. Mattel, supra, this Court is firmly of the view that a single scheme with a single defined purpose and a single victim is not sufficient to meet the pattern requirement even if numerous acts of fraudulent mailing or wire communications are made to effect the scheme. See generally Sedima, S.P.R.L. v. Imrex Co., 105 S.Ct. 3275 (1985). Since Eastern alleges only such a single scheme, its RICO claim fails.

Anti-Trust Claims

Eastern's anti-trust claims are grounded upon defendants' alleged acts of copyright infringement and appropriation of Eastern's confidential business information. Although, as this

Court suggested to Eastern's counsel during oral argument on the original motions to dismiss, these alleged wrongs may give rise to various state causes of action, they do not constitute the type of conduct which the anti-trust laws are designed to protect against. See Bunker Ramo Corp. v. United Business Forms, Inc., 713 F2d 1272, 1283 (7th Cir. 1983). Eastern alleges that defendants' alleged wrongful acts will damage competition, but the facts alleged by Eastern made it clear that all that is actually being alleged is damage to Eastern as a competitor. No cognizable anti-trust injury, which Eastern concedes is required, see, e.g. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488-89 (1977), has been alleged. This is apparent from the simple fact that prior to defendants' actions, there was one competitor (Eastern) in what Eastern

alleges to be the relevant geographical and product markets and, if defendants are successful in driving Eastern out of business (as Eastern alleges they are trying to do), there will be one competitor (Chesapeake) in the relevant markets. This fact makes clear that this is a classic case in which what is actually being alleged is unfair competition in the guise of an anti-trust claim.

For these reasons, defendants' motions to dismiss will be granted. A separate order to that effect is being entered herewith.

Date:

December 12, 1986 /s/

J. Frederick Motz
United States
District Judge

Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EASTERN PUBLISHING AND ADVERTISING, INC.	*	
v.	*	Civil No. JFM-86-1653
CHESAPEAKE PUBLISHING AND ADVERTISING, INC.	*	

****

ORDER

For the reasons stated in the memorandum entered herein, it is this 12th day of December, 1986,

ORDERED that defendants' motions to dismiss be granted.

/s/
J. Frederick Motz
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EASTERN PUBLISHING AND ADVERTISING, INC. (A CLOSE CORPORATION), T/A "ARMED FORCES NEWS," 619-A South Marlyn Avenue Baltimore, Maryland 21221

Plaintiff,

vs.

CHESAPEAKE PUBLISHING AND ADVERTISING, INC. (A CLOSE CORPORATION) T/A "THE MILITARY NEWS," 6 North Taylor Avenue Baltimore, Maryland 21221, ET. AL.,

Defendants

* CIVIL ACTION NO.: JF14-86-1653

AFFIDAVIT

* *

AFFIDAVIT

I, JOHN EDWARD TUCHTON, hereby certify that I am an adult, a resident of this District in Baltimore County, Maryland and that I am competent to testify. I am giving this affidavit upon personal knowledge as to those facts of which I am personally aware and cognizable of, and of those facts I have received information, I verily believe them to be true, much of which I have obtained factual verification.

I am the President and sole operating officer and the sole stockholder of the Eastern Publishing and Advertising, Inc., corporation at 619-A South Marlyn Avenue, Baltimore, Maryland 21221. The corporation creates and prints by volume and issue number a quarterly newspaper geared and directed to being read and received by military personnel and their families and dependents. The title of which is "Armed Forces News." This corporate publisher has, in printing this newspaper over several years, created a clientele of advertising customers in and around military installations segregated to area which generally conform to state boundaries.

This corporation creates original works in advertising, artwork, art form, configuration, stroke, drawings, selected wording and composition as well as a selected compilation of government issued and authorized reports of interest to such

readers. Those works are selected, compiled, arranged and highlighed and captioned as an original "compilation." The two types of fixed works are then wedded into a total "fixed work" which is the resulting printing "Flat." This "Flat" is then printed in quantity and distributed to the regions military bases and to the advertising customers therein for confirmatory copies. All original creations are fixed works for hire and entitled to copyright.

Prior to each quarterly issue the company has its personnel contact its prior advertising purchasers in the area of intended distribution and seek the renewal advertising of the company as created and with its artwork, etc., and obtain a contract for renewal printing that advertising.

On or about March 22 and March 27, 1986, the corporation, utilizing its original copyright fixed works and the

original compilation copyright fixed work, and having contracted with its advertising purchasers in the State of Virginia and District of Columbia, prepared and created the "fixed works" of "Volume V, Number III, and Vol. VI, No. IV in a two-part newspaper printing "Flat" of the Armed Forces News. It was first printed on 3/22/86 and 3/27/86 and thereafter published to that region's military bases and the advertisers.

On or about April 14, 1986 the Defendant, "Chesapeake Publishing and Advertising, Inc.," copied Plaintiffs fixed works and upon information and belief caused the assembled copies to be taken to the "Master Graphics" company at 3 Riverton Road, Baltimore, Maryland 21220 and fixed into a pasted and waxed newspaper "Flat" with a new title of "The Military News." All pagination and Plaintiffs' markings and identifications were removed and the product was made so

as to be without printer's identity. On or about April 21, 1986, the "Chesapeake Publishing and Advertising, Inc." took the infringing "Flat" to the "Carroll County Times Printing Co.," at 201 Railroad Avenue, Westminster, Maryland 21157 and had the infringing "Flat" multiple printed into several hundred copies and publicly displayed as their own and published thereafter into the State of Virginia to the military installations and advertising customers and potential advertising customers. The photocopying, cutting out and pasting together of the individual fixed works and the compilation of fixed works was done against both Vol. V, No. III and Vol. VI, No. IV of Plaintiff's newspaper. Copy attached to Motion for Temporary Restraining Order.

On or about 4/2/86, Defendants Karen Horn, Kimberly Horn, Carol Whitney Ansell and Della Lemmings were utilized as independent contractors by Plaintiff. They

all terminated their contracts on Friday, 4/11/86. On Monday, 4/14/86, they all were working for Defendant, "Chesapeake Publishing and Advertising, Inc." and had already leased and opened the premises at 6 North Taylor Avenue, Baltimore, Maryland 21221 for business. At that time they had the business telephones already installed and converted with Chesapeake and Potomac Telephone Co. service extended to number (301) 686-1665, inter alia. A deposit and checking account numbered 421-257-7 with printed company checks was established with the Essex Office of the Maryland National Bank. In addition the company applied, on 4/29/86, for and was issued United States Postal Bulk Mailing Permit numbered 1042 for use in publication.

Also, on 4/2/86 Defendants Alfred E. Clasing, III, Raymond J. Cannoles and Louise Martins executed Articles of Incorporation creating the Defendant company themselves and made themselves the sole

directors of Defendant "Chesapeake Publishing and Advertising, Inc." They filed the Articles of incorporation on 4/4/86 with the State Department of Assessments and Taxation with corporate registration number D-2107894.

The corporate papers designate the organization and creating subscribers as addressed at 818 Eastern Boulevard, Baltimore, Maryland 21221 with one of its purposes being to publish general and special interest newspapers and to sell advertising therein. See certified copy attached to Motion for Temporary Restraining Order filed herewith. Defendant company had no lawfully owned advertising to sell.

Also, on 4/2/86, at execution, the documents designated the principal offices to be located at 6 Taylor Avenue, Baltimore, Maryland 21221, which was not then an established newspaper office but which is the premises later opened on 4/14/86.

The Resident Agent of the corporation was designated as Karen A. Horn who was contracted with Plaintiff and had daily access to Plaintiff's copyright materials, but here giving her address also as 6 Taylor Avenue, Baltimore, Maryland 21221.

The Defendants, upon information and belief had no original advertising works to use as example and display and to engage in sales thereof, which was lawfully possessed and owned by them, from April 1, 1986 (and prior thereto) through and including April 21, 1986 and thereafter. They did, however, possess and infringe Plaintiffs' copyrights as follows, inter alia using the newspapers of Plaintiff by displaying them to the public, et. cet.

1. Plaintiff possessed the original coypright for the "fixed" advertising of "A Bit of Britain," 710 Gibbon Street, Olde Town, Alexandria, Virginia 22314. On 2/25/86 Ms. Liz Farrell, owner, contracted for the printing of the published adver-

tising held by Plaintiff for $85.00 in a written contract. Plaintiff created, printed and published that "fixed" copyright advertisement in Vol. V, No. III, on 3/27/86 as agreed in the "Armed Forces News" on page 12 Insert. Payment was by check No. 1157. Plaintiff's copy of the advertising contract was removed for Plaintiffs' customer file, along with numerous other customer contacts.

On 4/23/86, Plaintiff had its personnel contact Ms. Farrell by telephone to determine if she wished to renew the same prior quarterly advertising cited above in the next issue of Armed Forces News. Ms. Farrell stated she had already renewed her ad and had paid for it. It had not been renewed by Plaintiff and this was told to Ms. Farrell. Ms. Farrell stated they were renewing her ad but at our request she had to make her check payable to "Military News." She was told we were not The Military News and it was not our renewal.

On 5/9/86 Ms. Farrell was interviewed by our investigator and she stated the above as well as that she was led to believe that this contract by Military News was merely renewing the ad she had with us but there had been a price increase to $96.50. She then produced check No. 1238 dated 4/17/86 in that amount payable to Military News. Copy of check also received together with copy of prior contract taken from Plaintiff. The check and Plaintiff's prior contract attached to Motion for Temporary Restraining Order herein. It had been deposited to the above cited Maryland National Bank account of Defendant company. Ms. Farrell also produced a written receipt dated 4/17/86 (4 days before infringing advertising publication) for $96.50 from The Military News. Copy attached to Motion for Temporary Restraining Order.

The infringing of Plaintiff's copyright advertisement was for the future

displaying upon information and belief Plaintiffs' issue of the Armed Forces News to the public as their own without alteration and including all of Plaintiffs fixed protected work therein seeking and attempting to receive payment for reproduction by infringement.

2. Plaintiff also possessed the original copyright for the advertising of "Kiln Korner Ceramics," 8816 Brentsville Road, Manassas, Virginia 21111. The operator, Erma Jean Bonner, contracted with Plaintiff for published advertising in the same paper and paid $45.00 for it. Plaintiff created, printed and published that "fixed" copyright advertisement in Vol. VI, No. IV on page 27 as above.

On 4/23/86, Plaintiff had its personnel contact her for renewal and learned that she had previously renewed it also. After notifying her that no such renewal had been made with Plaintiff she took out her receipt and discovered it was paid at

their direction to the Military News. She was advised it was not our paper and was not our renewal.

On that date, she telephoned the number of Defendant at (301) 686-1665 from the receipt and requested return of her money. She spoke with the same girl, by voice and her identification, who had solicited the renewal by telephone. Upon giving her the further information that she had also called Quantico Naval Base for information on the Military News and had been informed they had never heard of the paper. She also told the girl that she thought she was renewing her advertisement in the "Armed Forces News," for an additional three months in the "Armed Forces News," with the same ad she previously used.

The girl at the Military News office informed her that she shouldn't request a refund since Ms. Bonner must have been talking on her telephone to the wrong

department. She informed her that the Military News and the Armed Forces News were the same company and that Ms. Bonner must have talked to the "Sales Department," and she was now speaking with the "Publishing Department." Ms. Bonner still demanded her money back which the girl agreed to do.

On 5/9/86 she gave an interview to our investigator and she re-stated the above facts as well as that a person named "Della" appeared at her store to pick up her ad renewal check and had given her a receipt for it on 4/16/86 (5 days before advertising printing) and had said it was for quarterly renewal of her prior advertising. This was after a telephone call she had received two or three days earlier from the identified solicitor (which would have been Monday, 4/14/86 or before).

Also, on 4/23/86, Ms. Bonner had demanded return of her payment from the girl at The Military News. She was

informed it would be returned the next day, 4/24/86. Not having received refund in a week and a half she again telephoned the same girl at The Military News who stated it had been mailed and must have gotten lost in the mail. She would put a stop payment and get her a new check. She had to take the check to the hospital since her boss, who signs checks, was in the hospital.

At that time, upon information and belief, Karen A. Horn was in the hospital.

On Monday, 5/12/86, Chesapeake Publishing and Advertising, Inc. check No. 151 dated 5/9/86 drawn on the above account and bank signed by Karen A. Horn for $45.00, was received by Ms. Bonner noted "Returned advertising check." A copy of the Kiln Korner check, The Military News receipt and the Chesapeake Publishing refund check attached to the Motion for Temporary Restraining Order.

The infringing of Plaintiff's copyright advertisement was for the future displaying, upon information and belief of Plaintiff's exhibited and published ad of the Armed Forces News without alteration and including all of Plaintiff's fixed protected work therein seeking and attempting to receive payment by infringement.

3. Plaintiff's personnel contacted "Alexandria Toyota, Inc.," 1707 Mount Vernon Avenue, Alexandria, Virginia to renew their $500.00 full page ad as printed on page 32 of Plaintiff's Vol. V., No. III, and learned that it had been renewed and paid for. Plaintiff did not renew it or receive money payment. The Military News received the payment and renewal and unlawfully printed the ad in Vol. 1, No. 1 at page 11 without permission and which was an infringement of copyright.

4. "Cronin's Pest Control," 1276 Cronin Drive, ad for $140.00 on page 8 Insert of Plaintiff's Vol. VI, No. IV contacted for renewal in Defendants' newspaper.

5. "Hamilton Jewelers," 13428 Jefferson Davis Highway, Woodbridge, Virginia 27191 in Plaintiff's Vol. VI, No. IV at page 18 Insert contacted for renewal in Defendants' newspaper.

6. A sample of the other infringing publication advertising contained in the two issues and unlawfully printed in Defendants' paper are:

A. "Auto Bumper Plating," 3806 S. Four Mile Run Road, Arlington, VA 22206; Our page 28 of Adv. Insert Vol. V, No. III, - their page 6 of Vol. 1, No. 1.

B. "Jewel Gallery," Our Vol. V., No. III, p. 7 of Plaintiff - their page 6 of Vol. 1, No. 1.

C. "Crossed Canoes, Inc.", Vol. V, No. III p. 7 of Plaintiff - their page 6 of Vol. 1, No. 1.

D. "Tony's Gulf Service" ad from page 11, Vol. V, No. III of Plaintiff's paper, printed on page 2, Vol. 1, No. 1 of Defendants' paper.

E. "Shirlington Texaco, Inc." ad from page 25 Insert, Vol. V, No. III of Plaintiff's paper, printed on page 2, Vol. 1, No. 1 of Defendant's.

F. "L.C. Reynolds Antiques" ad from page 25 Insert, Vol. V, No. III, of Plaintiff's paper, printed on page 2, Vol. 1, No. 1 of Defendant's.

G. "Gill's Auto Body"; "Pizza Convection" from Plaintiff's page 8, Vol. V, No. III, on page 8, Vol. 1, No. 1 of Defendant.

I have reviewed Defendant's 12 page newspaper, Vol. 1, No. 1 and its thirty-eight (38) major advertisements and six (6) public service advertisements as well

as its seventeen (17) government releases and can find none that was not previously printed in Plaintiff's publications.

On May 9, 1986, within 90 days of the first publication of Volume V, Number III by Plaintiff, I prepared and executed and filed Plaintiff's Application for Copyright of all the fixed works therein and the publication itself with the Register of Copyrights, Library of Congress together with deposit of two (2) copies thereof and payment for registration therefore.

On May 20, 1986 within 90 days of the first publication of Volume VI, Number IV, by Plaintiff I prepared and executed and filed Plaintiff's Application for copyright of all the fixed works therein and the publication itself with the Register of Copyrights, Library of Congress together with deposit of two (2) copies thereof and payment for registration therefore. Copies attached to Motion for

Temporary Restraining Order.

I further state that I am the chief supervisory official of Plaintiff and that I am familiar with the books and records of Plaintiff. Those records show that no Defendant had any permission or license from Plaintiff to print, copy, display, sell or publish to the public any portion of Plaintiff's copyrighted materials as contained in Defendant's public displays, printing, sales and advertising.

Those records show that Plaintiff has lost the income, proceeds, and profits of the copyright materials listed here and of all the infringed materials and as a result is suffering great and immediate harm and injury to its business and copyrights.

I further state that I have been informed and believe that the Defendant corporation with certain of its employees have compiled an additional printing of a newspaper and have had it taken to West-

minster Press for multiple printing. Such new issue may have contained Plaintiff's customers and their advertising.

Further, upon information and belief certain Defendants recently possessed and were using telephone directories for the State of Florida and the City of Tampa where Plaintiff also published copyright advertising for its customers.

Upon information and belief it is therefore alleged that the monies received by "Chesapeake" from the advertising, display, from Plaintiff's customers, and copyright use, was placed in a bank account and those funds were used to solicit customers, prepare print and publish other materials by "Chesapeake" without which the enterprise could not have survived. Further, the present business assets are derivative of the proceeds obtained by Defendants as herein alleged upon information and belief.

Affiant has read the matters and

facts set forth in the Complaint herein and the exhibits attached to the Motion for Temporary Restraining Order, and upon information and belief, of their truth, together with those matters of which I have personal knowledge.

On May 20, 1986 I have written and caused to be delivered to the Defendant Corporation and its resident agent at 6 North Taylor Avenue, Baltimore, Maryland 21221 a letter putting them on notice of Plaintiff's copyright acts and rights.

I hereby declare and affirm under the penalties of perjury that the matters and facts set forth in this Affidavit and the Complaint are true on the basis first above written.

Done this 22nd day of May, 1986.

/s/_____

JOHN EDWARD TUCHTON

Affiant

STATUTES AND RULES PROVISIONS INVOLVED

17 USC, ss 405. Notice of copyright: Omission of notice

(a) Effect of Omission on Copyright. - The omission of the copyright notice prescribed by sections 401 through 403 from copies or phonorecords publicly distributed by authority of the copyright owner does not invalidate the copyright in a work if -

(1) the notice has been omitted from no more than a relatively small number of copies of phonorecords distributed to the public; or

(2) registration for the work has been made before or is made within five years after the publication without notice, and a reasonable effort is

made to add notice to all copies or phonorecords that are distributed to the public in the United States after the omission has been discovered; or . . .

(b) Effect of Omission or Innocent Infringers. - Any person who innocently infringes a copyright, in reliance upon an authorized copy or phonorecord from which the copyright notice has been omitted, incurs no liability for actual or statutory damages under section 504 for any infringing acts committed before receiving actual notice that registration for the work has been made under section 408, if such person proves that he or she was misled by the omission of notice. In a suit for infringement in such a case the court may allow or disallow recovery for any of the infriger's profits attributable to the infringement, and may enjoin the

continuation of the infringing undertaking or may require, as a condition for permitting the continuation of the infringing undertaking, that the infringer pay the copyright owner a reasonable license fee in an amount and on terms fixed by the court.

18 USC, ss 1961. Definitions.

As used in this chapter -

(1) "racketeering activity" means (B) any act which is indictable under any of the following provisions of title 18, United States Code: section 1341 (relating to mail fraud), section 1343 (relating to wire fraud).

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the

commission of a prior act of racketeering activity;

18 USC, ss 1984. Civil remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 USC, ss 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

RULES

FEDERAL CIVIL RULES

RULE 12. Defense and Objections - When and How Presented - By Pleading or

Motion - Motion for Judgment on the Pleadings

(a) When Presented. A defendant shall serve an answer within 20 days after the service of the summons and complaint upon that defendant, except when service is made under Rule 4(e) and a different time is prescribed in the order of court under the statute of the United States or in the statute or rule of court of the state.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion.